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Yii Soon Ho v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05–42 OF 2011
ABDUL WAHAB PATAIL, HAMID SULTAN AND VARGHESE GEORGE JJCA
28 APRIL 2014

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused convicted and sentenced to death for offence of murder — Conviction and sentence based on circumstantial evidence — Whether sufficient to link accused to deceased's death — Defence of mental state — Whether accused possessed required mens rea when committing offence — Whether conviction and sentence safe — Penal Code s 302

In the High Court, the appellant was convicted for murder, an offence under s 302 of the Penal Code and was sentenced to death. At the close of the prosecution case, the trial judgeheld the prosecution had not adduced any direct evidence to the effect that the injuries found on the deceased's body were caused by or were the result of the acts of the accused. However, the court accepted the prosecution contention that there was sufficient circumstantial evidence to link the accused to the injuries which led to the death of the deceased. The accused's defence was that the accused's mental faculties had been impaired at the time of the alleged offence either by insanity; provocation; sudden fight; major depressive disorder ('MDD'); or intoxication. Alternatively, it was argued that the charge against the accused should be reduced to one under s 304 of the Penal Code. In the present appeal, the appellant brought forth the arguments that the charge had been amended by the trial judge and the amended charge had not been read out to the accused and that was fatal; the identity of the 'deceased' was not conclusively established as the doctor who performed the autopsy was not present when the post-mortem was carried out; the evidence as to the recovery of the incriminating knife was factually impossible as there were contradictions in the testimony of the prosecution witnesses; the possibility of the presence of a 'third-party' at crime scene had not been given due consideration by the trial judge; by reason of the MDD suffered, the accused's mental state was seriously impaired leading to him being not able to differentiate right from wrong. It was hence submitted that the requirement of 'mens rea' in respect of the offence was therefore lacking.

Held, dismissing the appeal and affirming the conviction:

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(1) No prejudice ensued to the accused and there was no misdirection by the trial judge as to the time of the commission of the offence in the circumstances (see para 40).

(2) There was no gap as in the evidence as to the identity of the deceased or the post-mortem report, referred to some other person other than the deceased (see para 44).

(3) Neither the different descriptions as to the location of the house nor whether the door was in front or in the rear of the house were material discrepancies in evidence. What was relevant was that it had been established as a matter of fact that the murder weapon had been recovered from the person of the accused, namely from the pocket of the trousers of the accused at the time of arrest (see para 47).

(4) There was no likelihood of another person committing the offence. There was uncontradicted evidence that PW16 was accosted by the accused brandishing a knife when she returned to the house, all the lights in the house had been turned off, the accused had rushed off PW16 to another place and confined her for two days threatening all along to kill her or the deceased and most crucially the recovery of the knife with the deceased's blood stains, all cumulatively pointed in one direction only, namely that the accused was the one who had committed the offence (see para 52).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, perayu telah disabitkan kerana membunuh, suatu kesalahan di bawah s 302 Kanun Keseksaan dan telah dihukum mati. Di penutup kes pendakwaan, hakim perbicaraan memutuskan pendakwaan tidak mengemukakan apa-apa keterangan langsung untuk membuktikan kecederaan yang didapati pada badan si mati disebabkan oleh atau diakibatkan oleh perbuatan tertuduh. Walau bagaimanapun, mahkamah menerima hujah pendakwaan bahawa terdapat keterangan mengikut keadaan yang mencukupi untuk mengaitkan tertuduh dengan kecederaan yang membawa kepada kematian si mati. Pembelaan tertuduh adalah bahawa fakulti mental tertuduh telah terjejas pada masa kesalahan dikatakan itu sama ada oleh ketaksiuman; provokasi; pergaduhan secara tiba-tiba; gangguan kemurungan yang teruk ('GKT'); atau mabuk. Secara alternatif, adalah dihujah bahawa pertuduhan terhadap tertuduh hendaklah dikurangkan kepada kesalahan di bawah s 304 Kanun Keseksaan. Dalam rayuan ini, perayu mengemukakan hujah-hujah bahawa pertuduhan itu telah dipinda oleh hakim perbicaraan dan pertuduhan yang dipinda tidak dibacakan kepada tertuduh dan itu adalah penting; identiti 'si mati' tidak dibuktikan secara konklusif kerana doktor yang melakukan bedah siasat tidak hadir semasa post-mortem dijalankan; keterangan berhubung perolehan semula pisau yang menunjukkan kebersalahannya adalah amat mustahil kerana terdapat percanggahan dalam keterangan

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saksi-saksi pendakwaan; kemungkinan kewujudan 'pihak ketiga' di tempat kejadian jenayah tidak diberikan pertimbangan sewajarnya oleh hakim perbicaraan; disebabkan oleh GKT yang dialami, keadaan mental tertuduh amat terjejas sehingga dia tidak dapat membezakan yang betul daripada yang salah. Justeru itu adalah dihujahkan bahawa keperluan 'mens rea' berkaitan kesalahan tidak mencukupi.

Diputuskan, menolak rayuan dan mengesahkan sabitan:

(1) Tiada prejudis terjadi kepada tertuduh dan tiada salah arah oleh hakim perbicaraan berhubung masa berlaku kesalahan dalam keadaan itu (lihat perenggan 40).

(2) Tidak terdapat jurang dalam keterangan berhubung identiti si mati atau laporan post-mortem, merujuk kepada beberapa orang lain selain daripada si mati (lihat perenggan 44).

(3) Juga tiada perbezaan penerangan berhubung lokasi rumah mahupun sama ada pintu adalah di depan atau di tepi rumah bukan percanggahan material dalam keterangan. Apa yang relevan adalah bahawa ia telah dibuktikan bahawa sebenarnya senjata untuk pembunuhan itu telah pun diperolehi daripada tertuduh, iaitu daripada poket seluar tertuduh pada masa tangkapan (lihat perenggan 47).

(4) Tiada kemungkinan orang lain yang melakukan kesalahan itu. Tiada keterangan yang bercanggah bahawa PW16 telah didatangi oleh tertuduh yang memegang pisau semasa dia pulang ke rumah, semua lampu dalam rumah itu telah dipadam, tertuduh telah membawa PW16 ke tempat lain dan menahannya selama dua hari dengan mengugut untuk membunuhnya atau si mati dan paling penting penemuan pisau dengan kesan darah si mati, semuanya menunjukkan ke satu arah sahaja iaitu bahawa tertuduh adalah yang melakukan kesalahan itu (lihat perenggan 52).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36, FC (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306, FC (refd)
Karam Singh v PP [1967] 2 MLJ 25 (refd)
PP v Hanif Basree bin Abdul Rahim [2004] 3 MLJ 271, HC (refd)
PP v Kenneth Fook Mun Lee (No 2) [2003] 3 MLJ 581, HC (refd)
PP v Magendran a/l Mohan [2005] 6 MLJ 6; [2005] 3 CLJ 592, HC (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)

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Legislation referred to

Evidence Act 1950 s 8 Illustration (i)
Penal Code ss 302, 304

Appeal from: Criminal Trial No 45–02 of 2005 (High Court, Miri)

Ranbir Singh Sangha (Ranbir S Sanga & Co) for the appellant.
Musli Ab Hamid (Deputy Public Prosecutor, Attorney General's Chambers Sarawak) for the respondent.

Varghese George JCA:

INTRODUCTION

[1] The appellant had been convicted of the crime of murder and thereupon sentenced to death by hanging by the High Court at Miri on 28 January 2011. The appeal before us was against both the conviction and the sentence.

[2] We heard the appeal on 14 November 2013 and after deliberations had unanimously dismissed the appeal. We now set out the reasons for our decision.

CHARGE

[3] The charge brought against the appellant was framed as follows:

> That you, on the 2nd day of February, 2005, at about 12.00 midnight, at Lot 488 Jalan Lentik 2, Pujut 2B, in the District of Miri, in the State of Sarawak, did commit murder by causing the death of one LEE GEK TIONG @ DIANA (P) and that you thereby committed an offence punishable under s 302 of the Penal Code.

(see p 2 of record of appeal, Vol 1).

THE PROSECUTION'S CASE

[4] The learned trial judge at the close of the prosecution's case observed that the prosecution had not adduced any direct evidence to the effect that the injuries found on the deceased's body were caused by or were the result of the acts of the accused. However after painstakingly analysing the evidence led, the court accepted the prosecution contention that there was sufficient circumstantial evidence to link the accused to the injuries which lead to the death of the deceased.

[5] The learned trial judge held that the ingredients to constitute the offence of murder had been satisfied and recorded the following ruling:

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I have scrutinised the evidence and authorities submitted by the learned DPP and the learned Defence Counsel. I am satisfied that the Prosecution had established a prima facie case against the Accused on the charge preferred in this case. I therefore now called [sic] upon the Accused to enter the defence.

CASE FOR THE DEFENCE

[6] The accused elected to give evidence under oath. The defence called three other witnesses.

[7] The defence raised was basically that the accused's mental faculties had been impaired at the time of the alleged offence either by:

(a) insanity, or

(b) provocation or sudden fight, or

(c) major depressive disorder ('MDD'), or

(d) intoxication.

Alternatively, it was canvassed that the charge against the accused should be reduced to one under s 304 of the Penal Code. It was also suggested that all along the accused was obsessed with PW16 and had no reason to harm the deceased.

[8] In advancing that defence on the issue of the state of mind of the accused at the time of the offence, the defence placed reliance on the evidence of DW4, a consultant psychiatrist who was of the opinion that the accused suffered a condition described as MDD.

JUDGMENT OF THE HIGH COURT

[9] At the end of the trial, the learned trial judge held as follows:

I have heard the evidence of the defence and reevaluated the evidence of the Prosecution. I further considered the submission and authorities submitted by both parties.

I found that the Accused had failed to raise a reasonable doubt against the prosecution's case. The alternative defences put forward by the Accused in this case cannot be accepted in the light of the totality of the evidence before this Court. I am not incline (sic) to believe the Accused's story of loss of memory at the time of the killing due to his suffering from MDD when he has no loss of memory of other events before and after the killing. To this the Accused has not proven on the balance of probability for (sic) defences concerned.

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BEFORE US

[10] Counsel for the accused raised five areas of contention in advancing this appeal before us. They were in broad terms the following:

(a) the charge had been amended by the learned trial judge and the amended charge had not been read out to the accused; this was fatal;

(b) the identity of the 'deceased' was not conclusively established, in that the doctor who performed the autopsy was not present when the post-mortem was carried out;

(c) the evidence as to the recovery of the incriminating knife was factually impossible as there were contradictions in the testimony of the prosecution witnesses;

(d) the possibility of the presence of a 'third-party' at crime scene had not been given due consideration by the learned trial judge; and

(e) by reason of the MDD suffered, the accused's mental state was seriously impaired leading to him being not able to differentiate right from wrong. The requirement of 'mens rea' in respect of the offence was therefore lacking.

EVIDENCE LED IN COURT

[11] Since the conviction was based on circumstantial evidence the material aspects of the evidence before the trial court are set out in some detail below.

[12] The deceased body was discovered by her son ('PW21') at the kitchen area of the deceased's residence (Lot 488, Jalan Lentik 2, Pujut 9B) on 3 February 2005 at about 2.30pm. PW21 had been alerted by his father ('PW20') that there was something amiss since PW20 had earlier noticed that the house remained locked, the air conditioners were running and further upon enquiry, PW20 was told that the deceased had not turned up for work.

PW20 and PW21 were not living at the same house with the deceased.

[13] PW20's phone calls made to the deceased and to his daughter ('PW16') were unanswered, whilst PW16's car was still in the car porch of the deceased's house. PW16 lived with the deceased at that house.

[14] PW16's evidence was that she and her mother, the deceased, had left the house at about 8pm on 2 February 2005 separately in their own cars. PW16 had returned to the house at about 3am in the early hours of the next morning

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(3 February 2005) and had found the deceased's car parked in the car porch. The lights of car porch was however not left on as was the usual practise of the deceased.

The iron grill to the front door was unlocked while the sliding door was locked. She unlocked the sliding door and entered the living room that was dark. She was locking the sliding door when the accused, who was her former boyfriend charged at her from inside of the house waving a knife (exh 25(A)) in a stabbing manner.

[15] PW16 was scared, screamed and then fell. The accused then pinned her down and warned her to stop screaming and to listen to him. The accused told PW16 that the deceased had been taken away to Bekenu and was in the care of the accused's friends.

The accused also threatened PW16 that harm would befall the deceased if PW16 did not comply with the accused's instructions.

[16] PW16 in her testimony said she did not believe the accused's claims. The accused ordered her to call out for the deceased but when she did, there was no response.

PW16 was then taken by the accused to her room to collect two bags (P40 and P62). The accused then rushed her out of the house. Apart from PW16's own room where the lights were switched on, the other parts of the house were in darkness. The only light thereabouts came from the street lights outside the house.

PW16 was not allowed into any other area of the house.

[17] The accused then locked up the house, drove PW16 in the deceased's car to a house in Tudan, Miri. She was confined in this premises restrained by musking tape and by a padlocked chain tied to a bedframe (P77, P78, P79(A)). Musking tape was also used to gag her mouth.

PW16 was warned that if PW16 resisted, the accused's friends would harm the deceased.

[18] During PW16's detention there, the accused repeatedly told her that either she or her mother (the deceased) should be killed. The accused also ranted that there was no turning back now and that PW16's parents should not have interfered with the relationship between PW16 and the accused.

The accused even asked PW16 as to how she preferred to be killed, by drinking Clorox, or by a pill overdose or even by the same knife (P25(A)).

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[19] She was only unchained to go to the toilet. While being held there she heard the accused communicating on the phone. PW16 was then told that the accused's cousin had told the accused that the accused was being watched by the police.

[20] The next morning (4 February 2005) some food, water and cigarettes were delivered at the place she was detained. In the afternoon, PW16 had attempted to lock herself alone in the room and shout for help.

The accused upon discovering this was agitated and once again threatened to get his friends to kill the deceased. The accused kept on shouting at her and threatened to even kill her.

[21] On the following day (5 February 2005) in the evening, the accused told PW16 that he had been asked to leave the place. In the dark of the night the accused and PW16 were assisted by a taxi driver ('PW3') to move to another house, at Tusan in Bekenu. She was warned not to talk to anyone or otherwise the knife (which the accused had with him always) would be used against her.

[22] In the evening of the following day (6 February 2005) two policemen came to that house where the accused and PW16 were in. The accused explained to the policemen, that they (accused and PW16) were just passing and offered some money to be left alone. However, PW16 then took the opportunity to tell one of the policemen that she had been kidnapped and warned the policemen of the knife with the accused. One of the policemen then searched and discovered the knife that had been kept in the left trousers pocket of the accused.

[23] It was also in evidence that:

(a) about a month before the 3 February 2005 there had occurred an incident at the deceased's house where the accused had forcibly taken PW16 from that house to Bekenu. The deceased had then lodged a police report (P38) in respect of that incident but that report was subsequently withdrawn as a settlement was reached;

(b) the deceased had previously told PW13 (a friend of the deceased) that the deceased did not approve of PW16's relationship with the accused;

(c) the accused had driven his car back and forth along the road in front of the deceased's house during the period between 3 January 2005 and 3 February 2005 stalking on PW16;

(d) the accused had still in his possession a set of keys (exh P39) to the deceased's house until it was recovered from him by the police; the keys

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had been given to the accused by PW16 when they were in the relationship but the accused had refused to return it despite various requests after they broke up;

(e) there was no sign of a break in at the deceased's house on the day the body was found.

[24] A post-mortem was carried out on 5 February 2005 by PW12 (a consultant pathologist from the General Hospital, Kuching) on the body recovered from deceased's house. The body was positively identified to be of that of the deceased by PW20, the deceased's husband.

The cause of death as per the autopsy report (P35) was stated as 'stab wounds at the chest penetrating the right lungs'.

[25] It was PW12's evidence that the deceased had sustained 15 wounds — three cut wounds and 12 stab wounds. The stab wounds:

(a) medial to right nipple measuring 2.9cm long, 0.8cm (penetrating the right lung); and

(b) below the above wound, measuring 2.5cm long, 0.8cm wide

were considered the fatal wounds as they penetrated the right lung causing the right haemothorax, ie bleeding in her right chest.

According to PW12 the wounds were inflicted with substantial force and could have been caused by a sharp object like the seized knife — P25(A).

[26] It was also P12's evidence that the above described fatal stab wounds were inflicted when the deceased was upright or in a lying position facing her assailant.

As regards the other wounds (two of which were from behind) they were inflicted with moderate force also caused by a sharp object like the knife P25(A). There were two wounds on the left wrist of the deceased caused also by a sharp object like the knife P25(A) applied with strong force.

[27] PW15 had analysed blood stains/blood samples handed to him for DNA profiling and this included some items of clothing, a pen — knife, Sample E18/P25(A) having human blood stains and sample E23/P26A — a glass bottle containing blood samples. His finding was that the swaps of the blood stains taken from the blade, handle and blade-housing of the knife (sample E18/P25(A) and the blood sample originated from the same source.

PW25 (the investigating officer) confirmed that Sample E23/P26(A) was the blood sample of the deceased.

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[28] PW10 had analysed sample E28/exh P12 labelled 'Yii Soon Ho' (who was the accused) to be a specimen of Group O human blood. As to sample E30/exh P13 labelled 'Christina Audrey' although he found it to be also Group O human blood, he went on to state that this sample had however been previously contaminated.

[29] Another chemist PW1 had analysed another blood specimen, Sample E1/P33C labelled 'Christina Audrey Jolly' (who was P16) and found the blood grouping to be Group A human blood.

[30] With regard to the knife seized from the accused (P25(A)), it was P16's evidence that she had seen the accused carrying the knife even prior to the early hours of the 3 February 2005 when the accused charged at her using the same knife when she had entered the house where she and the deceased resided. It was also the same knife that the accused had repeatedly brandished against her at the houses at Tudan as well as in Tusan, before it was seized by the policeman (PW19) from the accused.

The knife was 8.5cm in length and 2cm in width and based on the length of the blade, PW12, the pathologist, was of the view that this was the probable weapon used to inflict the injuries on the deceased.

[31] In his evidence, the accused admitted that up to about a month before the deceased was found dead, he had been in a serious relationship of a sexual nature with PW16, the deceased's daughter. PW16 had decided to end it and despite his repeated attempts to reconcile after the break up, he had been rebuffed by PW16.

During their relationship he admitted further he had been given a set of keys to the deceased's house (save to the grill doors) and it was not denied too that he was familiar with the premises from his regular visits, including stay overs, at that house.

[32] The accused also admitted that he had disapproved of PW16's conduct and habits especially her night jaunts, during which he had seen her dancing and hugging other men. He had been angry with her and often could not control his temper towards her.

[33] In so far as his relationship with the deceased was concerned, the accused further admitted that the deceased had persistently advised him to change his ways, stop gambling and smoking, get a stable job and to control his temper.

[34] It was the accused's testimony that on the night of 2 February 2005, he could only recollect going up to the gate of the house. Thereafter his memory

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was 'blurred' as to what had happened until he was arrested in Tusan by the Police. He claimed to have consumed 'eramin 5' or 'happy 5' pills (drugs) prior to going to the house to relieve the stress and depression he was undergoing as a result of the break up with PW16. He however denied he was addicted to drugs.

SOME SALIENT ASPECTS OF THE JUDGMENT AT THE HIGH COURT

[35] In the judgment convicting the accused, the learned trial judge referred also to Illustration (i) of s 8 of the Evidence Act 1950 and held that the evidence of the accused having repeatedly threatened to kill PW16 or the deceased and the attempts to conceal the murder from PW16 during the two days of confining PW16 elsewhere from the deceased's house were consistent with a guilty mind and there was sufficient nexus between the conduct of the accused and the offence he was charged with.

[36] The learned trial judge also took into consideration the previous conduct of the accused especially the incident a month earlier (highlighted earlier) where the deceased had lodged a police report against the accused (subsequently withdrawn) and the repeated rantings of the accused to PW16 that the deceased had interfered in his relationship with PW16; this had been corroborated by PW13, deceased's friend, who testified as to the deceased's dislike of the accused and the deceased's disapproval of PW16's relationship with the accused.

[37] The learned trial judge also cautioned himself that in a conviction based on circumstantial evidence motive behind the crime was to be a significant consideration, as was laid down in *Public Prosecutor v Hanif Basree bin Abdul Rahim* [2004] 3 MLJ 271. It was observed there in that decision:

> [66] It is not incumbent upon the prosecution to prove the motive of a crime. However if the crime is alleged to have been committed for a particular motive, as in the case here, it is relevant to inquire whether the pattern of the crime fits in the with the alleged motive. Where a case is based on a circumstantial evidence the motive for committing that crime assumes greater importance. It is certainly an important strand of circumstantial evidence to impute the accused's guilt ...

OUR EVALUATION OF THE GROUNDS TAKEN IN APPEAL

Amended charge not read to accused

[38] The charge as originally framed (see Vol 1 of record of appeal at p 2) read that '... on the 2nd of February 2005, at about 12.00 midnight, at ...'. However

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the charge as reproduced by the learned trial judge in the grounds of judgment read at the material part that '... on the 2nd of February 2005 at between 9.00 pm and 12 midnight ...'.

It was counsel for the accused's contention that the learned trial judge had amended the charge but this had not been read out to the accused.

[39] Counsel however agreed with the court that a charge to be sufficient had to set out a specific time frame for the alleged offence and in this case, the evidence led as to the murder of the deceased was well within the either of the specified time frame, notwithstanding that PW16 had returned only at 3am (early hours of 3 February 2005) to be accosted by the accused at the deceased's house.

[40] Counsel also conceded that there was no challenge during the trial as to the time the offence was alleged to have been committed as originally set out in the charge. It was in evidence that PW16 had left the house at about 8pm.

In our assessment there was therefore no merit in counsel's contention on this point. In any event we were of the view that no prejudice ensued to the accused and there was no misdirection by the learned trial judge as to time of the commission of the offence in the circumstances.

IDENTITY OF DECEASED

[41] Counsel for the accused contended that the prosecution had failed to prove the death and the cause of death of the deceased. This submission was premised upon the following:

(a) the post mortem report (P35) had referred to a police report 'dated 5/2/05 Miri'; no such report was tendered in evidence;

(b) in P35 itself, the autopsy was noted to have been done on '13/02/2005' while it was also recorded there that the body was brought to the hospital on 3 February 2005; and

(c) the photographs (P8) taken during the post-mortem did not show that PW12 (Dr Jamil) who tendered P35, was present during the procedure.

[42] The learned DPP in response stated that there had indeed been an error in the recording of the dates. The police report in question was dated the 3 February 2005 (not 5 February 2005 as recorded on P35) and this had been tendered as evidence. Similarly the post-mortem was conducted on 5 February 2005 after the body had been identified by the husband of the deceased (PW20) on that date prior to the post mortem being carried out.

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[43] It had been put to PW12 (Dr Jamil) by the defence during the trial that he did not conduct the post-mortem but the witness had disagreed (notwithstanding that his image was not in any of the photos). No evidence was led by the defence to contradict this. (PW12's affirmative evidence to this effect was found at pp 317, 318 of Vol 11 of the record of appeal).

[44] On our part we were not persuaded that there was a gap as contended in the evidence as to the identity of the deceased or that P35, the post-mortem report, referred to some other person other than the deceased.

RECOVERY OF THE KNIFE

[45] It was counsel for the accused's contention before us that there were discrepancies in evidence as to the location where the knife (P25A) with the deceased's blood stains was recovered from the accused. Much was attempted to be made out of the testimonies of police witness PW19, who had stated that the house where the accused was arrested was located at 'Pantai Tusan *Sibuti*, while the other police witness PW25 had described the location to be at 'Pantai Tusan, *Bekenu*. PW16, on the other hand had referred to the place as at 'Trusan', Bekenu'.

[46] It was also argued that related to this issue of recovery of the knife, the evidence of PW19 was that it was seized from the pocket of the accused after the accused had run out of the front door of the house. This it was contended was a factual impossibility as from the available photographs the house concerned did not have a door at the front.

[47] In our assessment neither the different descriptions as to the location of the house nor whether the door was in front or in the rear of the house were material discrepancies in evidence. What was relevant was that it had been established as a matter of fact through PW19 and PW25 that the knife had been recovered from the person of the accused, namely from the pocket of the trousers of the accused at the time of arrest, at Tusan, Bekenu.

There was no basis therefore to hold that the learned trial judge had misappreciated the evidence as to the recovery of the knife.

POSSIBILITY OF A THIRD-PARTY AT THE SCENE OF THE CRIME

[48] It was submitted by counsel for the accused that the possibility of a third-party being present in the deceased's house after the accused and PW16 had left, committing the murder, should not have been ruled out by the learned trial judge. The counsel's argument was that we should view this possibility in the light of the fact that:

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(a) there was no eye-witness to the stabbing or killing of the deceased and the exact time of 'death' had never been established, and

(b) it was the evidence of PW8 (Dr Mo) that there was no obvious injuries or any bleeding detected when she examined the accused (P11 and P11A); therefore the evidence of PW25 that stains of blood of Blood Group 'O' found on the grill to the main door, at the toilet and on a mop could not have come from the accused, but from some other assailant.

[49] It need to be pointed out that DW8 only examined the accused on 8 February 2005 while the alleged incident took place in the night of 8 February 2005. There was no dispute that the accused blood was of Blood Group 'O'.

[50] This contention that a third-party (with Group 'O' Blood) possibly committing the offence, it was noted, had been raised by counsel for the accused in his submissions at the close of the prosecution's case and the following appear from the notes of evidence.

Defence Counsel:

On the issue of the accessibility to the house the Deceased herself could have opened the door to any visitor. Also there is evidence to show that others had the key to the house such as PW16 (Christina) and PW21 (Ronald). Family members can let anybody else into the house as well and there is also evidence that PW16 had other boyfriends. The photographs tendered by the Defence shows that they were present in the house as well albeit not at the material time. The very fact that it is blood group O not belonging to the Accused found in the house shows that somehow that the third party had access to the house. The possibilities are many as far the mode of access is concerned. That is all.

Court: To the Defence Counsel:

Q: Did you suggest or put to PW16 (Christina) and PW2 (Roland) that they had killed the Deceased?

A: No.

Q: Did you suggest to Christina (PW16) that she had given spare key to the house to other boyfriends?

A: No.

Q: Did you suggest or put to any of the prosecution's witnesses that there is a possibility that there is unknown third-party in the house at that material time of the Deceased's death?

A: Yes to l.O.(PW25)

Q: In your submissions you stated that the Accused and PW16 left the house after locking the grill of the house. Would the Deceased stll be alive at that time.

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A:	There is a possibility.
Q:	If it is, why didn't the Deceased answer PW16 when she called out for her in the house when told by the Accused to do so?
A:	Maybe she was not in the house.
Q:	If she was not in the house how come she was found dead in the kitchen of the house?
A:	She could have come back in the house after Christina and the Accused left the house.
Court:	To the DPP:
Q:	What else you want to say about the presence of the third party?
A:	Nothing else except the Deceased's car was at the car porch and her personal belongings i.e. her hand bag, handphone, a pair of spectacles and the key to the house were in the house when Christina came back from her night jaunt at about 3.00 am.

[51] The learned trial judge was obviously not convinced of this possibility based on the evidence before him and had gone on to hold that a prima facie case had been made before calling for the defence.

[52] We were not convinced either that there was a likelihood of another person committing the offence. We agreed with submissions of the learned DPP that there was uncontradicted evidence that PW16 was accosted by the accused brandishing a knife when she returned to the house, all the lights in the house had been turned off, the accused had rushed off PW16 to another place and confined her for two days threatening all along to kill her or the deceased and most crucially the recovery of the knife with the deceased's blood stains, all cumulatively pointed in one direction only, namely that the accused was the one who had committed the offence.

MDD

[53] With respect to this grounds of appeal, it was counsel for the accused's contention that the accused '... could not have formed the necessary intention to kill the deceased as his mind was labouring under the influence of the 'Happy 5' drug as well as Major Depressive Disorder (MDD)'.

[54] At the trial, the defence had placed reliance on the evidence of DW4 (Dr Rajinder Singh) a consultant psychiatrist, while the prosecution through rebuttal witness PW30 (Dr Lau Kih Kah), a senior consultant psychiatrist challenged that opinion as to that condition or state of mind of the accused at the time of the offence.

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It was not in dispute that DW4 had only examined the accused once on 11 March 2008 during ward rounds and he further conceded that the relevant case notes/clinical assessments of the accused were all documented by one Dr Syarifah and one Dr Rosilawati, who were not called as witnesses by the defence.

[55] Surely, by its very nature, any finding as to a condition like MDD can only be made after long observations of the patient over a period of time and not merely based on case notes made by some other. In *Public Prosecutor v Kenneth Fook Mun Lee (No 2)* [2003] 3 MLJ 581 it was highlighted that:

> ... As *Sarkar on Evidence 15th Ed* says at p 901, opinion of medical men based on hearing the evidence of other witnesses without observing facts is not of much value. Thus opinion of doctors based mostly on prescription an on their general knowledge of the course of a disease are always indirect evidence and not much of weight when compared with the evidence of doctors who personally attended the patient (*Hari Singh v Lachmi* 59 IC 220; 12 PLR 1921.

DW4 himself conceded inasmuch when he conceded that in a forensic case investigating MDD, the psychiatrist needs to attend to the MDD patient personally to assess the symptoms and signs correctly over a period of time.

[56] The learned trial judge had devoted some 20 pages of His Lordship's 101 page judgment in analysing the testimonies of DW4 and PW30. The learned trial judge was of the view that DW4 was not a forthright witness and his evidence was incoherent and inconsistent at times.

[57] On the other hand, PW30 in his testimony had concluded from the material and facts before him, that it could not be concluded that the accused was suffering from MDD. (The case notes made by Dr Sharifah had several times queried whether the accused was 'malingering' — meaning pretending). PW30 was also of the view that even if the accused was beset with a MDD condition, he was still able to differentiate between right and wrong and control his actions unless at the time of the incident itself, some form of 'psychosis'. induced by drug intake perhaps, had set in.

[58] PW30's opinion, preferred in the circumstances by the learned trial judge, was that the accused was very angry and by nature of the injuries inflicted the accused knew and intended what he was doing. PW30 summarised his view as to the conduct of the accused in the following terms:

> ... the autopsy report said there were 15 injuries, 12 of which is stabbed wounds and 3 were cut wounds and of these injuries two were inflicted with considerable force. Out of the 15 injuries 13 were injuries inflicted to the front of the victim and 2 were to the back of the victim. My opinion is that these are injuries inflicted by somebody who was very angry and intended the injuries to cause serious harm to the victim. As to the state of mind, my opinion is that the accused knew what he was doing that

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A means the accused was stabbing and intending to cause harm to the victim. Regarding self-control, I would like to say that the issue here is not the loss of control but the willingness or lack of to exert reasonable control.

B **[59]** The learned trial judge who had heard, assessed those two witnesses thereafter made the decision that the accused was not at the time of the offence in a state where his cognitive faculties were impaired, so as to be absolved of responsibility for his actions. We did not find any reason to interfere with that decision.

C **[60]** Before us, counsel for the accused did not pursue seriously the defence of intoxication earlier raised at the trial. It was trite, that in any event, self-induced intoxication as the underlying cause for any alleged defect in reasoning (at the time of commission of an offence), was not recognised or acceptable as a valid defence, in our law.

D

CONCLUSION

[61] Having given due consideration to the submissions of counsel for the accused and the submissions of the learned DPP, we were of the unanimous view that learned trial judge had not misdirected or erred in law or as to the facts in this case, such as to merit appellate intervention (or to reduce the conviction and sentence to one under s 304 of the Penal Code, as argued in the alternative by counsel).

F

[62] The principles governing the acceptance of circumstantial evidence to convict an accused have been laid down in numerous cases including *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306; *Public Prosecutor v Magendran a/l Mohan* [2005] 6 MLJ 6; [2005] 3 CLJ 592; *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25; *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36.

G

The principle gleaned from those authorities was that a conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence lead to an irresistible conclusion that it was the accused who committed the crime.

H

[63] Suffice it here to reproduce some guiding excerpts from the aforecited authorities, to support that position.

I

In *Sunny Ang*'s case (where the deceased's body was never found) the Federal Court noted:

> ... The second question to which I must draw your attention is that in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of

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A

> all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example — was it accident?

Thomson CJ's comments in *Chan Chwen Kong*'s case were in the following terms:

B

> ... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

C

In *Karam Singh*'s case, HT Ong FJ stated:

> ... In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused ...

D

And in *Chang Kim Siong*'s case, the Federal Court emphasised that:

> The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

E

[64] The learned trial judge had applied the correct test and principles in convicting and sentencing the accused under s 302 of the Penal Code.

[65] We therefore dismissed the appeal and affirmed the conviction and the sentence as ordered by the High Court.

F

Appeal dismissed and conviction affirmed.

Reported by Afiq Mohamad Noor

G

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I